No. 90-18

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT D. GILMER,
Petitioner,

v.

INTERSTATE/JOHNSON LANE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR PUBLIC RESOURCES, INC. IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The Center for Public Resources, Inc. (CPR) submits this brief as amicus curiae urging affirmance of the decision by the Court of Appeals for the Fourth Circuit.[1]

CPR is a non-profit corporation founded in 1979 and located at 366 Madison Avenue, New York, New York 10017. CPR's sole activity is the CPR Legal Program, a national coalition of 200 major corporations, generally represented by their chief legal officer; 100 law firms, represented by a senior partner; and legal scholars.

The CPR Legal Program is devoted to the field of alternative dispute resolution, or "ADR," as it is popularly called. Recognizing that courts, administrative agencies, and litigants alike are ill-served by costly, time-consuming, resource-wasteful and divisive litigation, the mission of the CPR Legal Program is to develop, promote and implement alternatives to litigation. CPR committees of eminent practitioners have developed ADR approaches in a number of legal areas, including employment, hazardous waste, product liability, technology and toxic tort.

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[1] Written consent of the parties to the submission by CPR of this brief amicus curiae are on file with the Clerk of this Court.

Pertinent to the issue sub judice is the CPR's Model Employment Termination Dispute Resolution Procedure (Model Procedure), a project of the CPR Employment Disputes Committee, which is composed of leading lawyers from the management and plaintiffs bars as well as from academia and neutrals. The Model Procedure and the CPR's Model Agreement to Submit Termination Disputes to the Model Employment Termination Dispute Resolution Procedure (Model Agreement) are contained in Appendix A to this Brief.

The Model Procedure is incorporated into a model predispute agreement and sets out the rules by which any controversy over the termination of employment (or any other designated employment dispute) would be resolved in arbitration. An employee who signs the Model Agreement would be agreeing to have arbitration of these disputes governed by the Model Procedure. The Model Procedure could be used when hiring particular executives or could be made applicable generally to all employees or selectively to some, as a matter of corporate policy.

The Model Procedure is designed to relate only to employment terminations, though it may easily be adapted to

include other types of employment claims. Initially, the term "dispute" is defined broadly so it encompasses all manner of claims arising out of an employment termination. This is to place all such claims into arbitration, before a single "adjudicator",[2] and ensure their resolution efficaciously in a single proceeding.[3] Furthermore, by employee-employer agreement, resolution of any dispute pursuant to the Model Procedure, including disputes involving statutory, common law or contractual protections, is to be final and binding, or if not, to be accorded the fullest weight permitted by law.[4] As to discovery, the employee is expressly granted the right to depose one employer representative on the assumption that the employer has greater access to the reasons for termination.[5] The employee is also entitled to review his or her personnel record unless, upon a showing of good cause, the adjudicator excludes

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2 Model Procedure, Article Eight at App. A-27-28.

3 Model Procedure, Article One at App. A-21 and Commentary at App. A-42-44.

4 Model Procedure, Article Two at App. A-22-23 and Commentary at App. A-44-48.

5 Model Procedure, Article Ten at App. A-29 and Commentary on Article Ten at App. A-52-53.

certain confidential matters.[6] Other discovery is permissible but is confined to that which is relevant and for which each party has a "substantial, demonstrable need."[7] This limited discovery is aimed at ensuring a fair but cost-efficient proceeding and at curbing abuses encountered in certain court litigation.

The employee bears the burden of persuasion to demonstrate that the termination was not based on any legitimate business reason, considering the nature of the employee's position and responsibilities and the employer's stated policies.[8] Such a burden distinguishes the Model Procedure from an arbitration pursuant to a collective bargaining agreement's grievance procedure where an employer usually must prove "just cause." It instead places the burden on the employee in a manner roughly comparable to what it would be in civil rights litigation, and the commentary to the Model Procedure makes this eminently clear.[9] Hence, the adjudicator is expected to apply relevant statutory law, both

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6 Id.

7 Model Procedure, Article Ten at App. A-29.

8 Model Procedure, Article Thirteen at App. A-30-31.

9 Model Procedure, Commentary on Article Thirteen at App. A-53-55.

substantive and procedural. Indeed, under the Federal Arbitration Act (FAA), a court may vacate an award issued pursuant to the Model Procedure on the ground that an adjudicator who failed to apply prevailing law as required by the Model Procedure exceeded his authority.[10]

As far as the reasonable expenses of the adjudication are concerned, the employee is only required to pay the lesser of one-half of those costs or two days' gross compensation. These expenses (fully recoverable if the employee prevails) include the costs of the adjudicator and filing fees.[11] This makes the Model Procedure even more accessible to all employees.[12]

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10 See Federal Arbitration Act, 9 U.S.C. § 10(d); see also Model Procedure, Article Twenty-One at App. A-37-38; cf. Newsday, Inc. v. L.I. Typographical Union, 915 F.2d 840 (2d Cir. 1990) (labor arbitration award vacated as being against public policy embodied in Title VII of the Civil Rights Act of 1964). In enforcing predispute agreements to arbitrate statutory claims, a judge may retain jurisdiction of the case for subsequent review of the arbitral award. See Roe v. Kidder Peabody and Co., Inc., 52 Fair Empl. Prac. Cas. (BNA) 1865 (S.D.N.Y. 1990) (Haight, D.J.).

11 Model Procedure, Article Sixteen at App. A-32-33.

12 Model Procedure, Commentary on Article Sixteen at App. A-57-58.

Significantly, unlike most commercial arbitrations, the Model Procedure requires the adjudicator to render his or her decision in writing with express findings of fact on each issue of fact raised, the rationale for the decision and, if necessary, conclusions of law and discussion of legal authorities.[13] This requirement ensures that, even if the arbitral award is not final and binding as to its disposition of statutory claims, it would serve a therapeutic and deterrent function in not simply informing a party that it lost in whole or part, but in explaining in a reasoned manner the bases for the decision.[14] Moreover, a reasoned decision could serve persuasively in another proceeding, allowing a reviewing court to decide whether the arbitral award is dispositive of statutory claims.[15]

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[13] Model Procedure, Article Seventeen at App. A-33-34.

[14] See M.M. Hoyman and L.E. Stallworth, "Arbitrating Discrimination Grievances in the Wake of Gardner-Denver," BLS Monthly Labor Review, at 3-10 (Oct. 1983), reporting on a study which found that, after Gardner-Denver, relitigation of arbitration decisions had not occurred in a majority of cases and, where it had occurred, the arbitrator was rarely contradicted.

[15] Model Procedure, Commentary on Article Seventeen at App. A-57-58.

The adjudicator has broad remedial powers and may award reinstatement, back pay and attorney's fees.[16] If reinstatement is warranted but not appropriate, up to two years' front pay may be awarded.[17] An employee has a duty to mitigate,[18] but the adjudicator may award liquidated damages.[19]

In sum, the protections of the Model Procedure bolster the conclusions of this Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), that arbitration need not involve the loss of any substantive rights, but rather is purely a forum selection device.[20]

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[16] Model Procedure, Articles Nineteen and Twenty at App. A-35-37.

[17] Model Procedure, Article Nineteen at App. A-35.

[18] Id at App. A-36.

[19] Id.

[20] In many procedural respects, CPR's Model Procedure is similar to the American Arbitration Association's (AAA) "Commercial Arbitration Rules," and its "Model Employment Arbitration Procedures," one or the other of which have been incorporated by reference into certain executive employment agreements. In one key respect, for the purpose of selecting an arbitrator, the CPR model incorporates the AAA's "Commercial Arbitration Rules." Model Procedure, Article Eight at App. A-27.

ISSUE PRESENTED

Whether claims brought pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq., are subject to compulsory arbitration.

STATEMENT OF THE CASE

CPR adopts the Respondent's statement.

SUMMARY OF ARGUMENT

With the courts remaining congested and backlogged, it is important to promote mutually beneficial alternative means of dispute resolution such as the arbitration of employment disputes. To promote arbitration as a term of employment is to offer employees a quick, inexpensive method of resolving individual disputes. In this regard, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), is not controlling. Gardner-Denver, a case involving the assertion of Title VII rights, arose in the context of arbitration under a collective bargaining agreement, and this strongly distinguishes it, since its holding was premised on the Court's concerns that, in the collective bargaining context, an employee's rights could be sacrificed for the union's

collective good, and that a labor arbitrator, bound only to interpret the parties' agreement, would not be obligated to apply applicable statutory law. Gardner-Denver was also based on the now-outdated view that arbitrators were less capable of resolving statutory disputes.

Recently, in cases involving individual agreements to arbitrate, such as that found here, this Court has consistently compelled the arbitration of claims arising under federal antitrust, securities and RICO laws. In fact, the presumption is in favor of arbitration, and the party opposing it bears the burden of showing that Congress intended to preclude its use as to a particular statute. And there is nothing in the ADEA or its legislative history which expresses any such Congressional intent.

The "Older Workers Benefit Protection Act" sets forth detailed requirements which must be met in order effectively to waive ADEA rights.[21] A predispute agreement to arbitrate may still be enforced, however, since an employee, by agreeing first to

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[21] "Older Workers Benefit Protection Act," Pub. L. 101-433, Title II, Section 201 (1990).

arbitrate a dispute, would not be relinquishing his right later to proceed in court.[22]

ARGUMENT

I.

CLOGGED COURT DOCKETS AND SKYROCKETING LEGAL COSTS SIGNAL THAT AGREEMENTS TO ARBITRATE SHOULD BE ENFORCED.

Two thousand, one hundred and sixty-six is the percentage increase from 1970 through 1989 in the number of

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[22] Although we agree with Respondent that not before this Court is the issue of whether the FAA § 1 exempts all employment contracts from its coverage, we wish to point out that long ago this issue was resolved in the seminal case of Tenney Engineering, Inc. v. United Electrical, Radio and Machine Workers, 207 F.2d 450 (3d Cir. 1953), and, although the Court did not mention this point in Perry v. Thomas, 482 U.S. 483 (1987), it there enforced, under the FAA, an agreement to arbitrate an employment dispute. Moreover, if this Court were to construe FAA § 1 to exclude all contracts of employment from its coverage, it would create an unfortunate void in that the only employment arbitration contracts which would be enforceable in federal court would be those in collective bargaining agreements and then only in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. There is no basis for believing that such an anomalous result was intended by Congress.

employment discrimination cases filed in federal court, as reported by the Federal Courts Study Committee. By comparison, during that same period, all other federal civil litigation increased by only 125 percent.[23]

Although, in 1966, cases contesting hiring practices outnumbered employment termination cases by 50%, by 1985, termination cases reversed this ratio by more than six to one.[24] In 1986-1987, a total of 115,536 charges of unlawful discrimination were filed either with state and local human rights agencies or the Equal Employment Opportunity Commission (EEOC).[25] In that same period, over 10,000 cases of employment discrimination were

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[23] Daily Labor Report No. 5, at A-3 (Jan. 8, 1990) citing Federal Courts Study Committee Working Papers and Subcommittee Reports July 1, 1990 - Volume II at 49. (The Study Committee also pointed out that "in most nations, and in most areas of employment law in this nation, disputes are resolved by arbitrators" and recommended that employment discrimination claims be resolved in binding arbitration. Report of the Federal Courts Study Committee April 2, 1990, Part I, at 19).

[24] Federal Courts Study Committee Working Papers and Subcommittee Reports July 1, 1990 - Volume II at 50.

[25] U.S. Equal Employment Opportunity Commission, Office of Program Operations, Enforcement Statistics: FY 1980 - FY 1989 (1/90).

filed in federal and state courts, and 20,000 cases of unjust discharge were pending in state courts as well.[26]

In addition to the fact that the courts and administrative agencies are literally overrun with these claims, the costs to both sides in litigating them in a judicial forum are high. A Rand report has concluded that, during 1980–1986, defense fees in the wrongful discharge cases it studied averaged $83,862 and were rising 15–24 percent annually.[27] Assuming a typical 40 percent contingency fee and based on an average plaintiff final payment of $208,212, plaintiff attorney's fees come to $83,285. The $167,147 total of average legal fees is about 33 percent higher than the amount plaintiffs actually receive.[28] The Rand report demonstrated that, in the end, after expenditures for costs and fees, the median plaintiff received only $30,000.[29] Significantly, the average case waited three years and two months from its filing to

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[26] A.F. Westin & A.G. Feliu, "Resolving Employment Disputes Without Litigation" at 1 (Bureau of National Affairs 1988).

[27] J. Dertouzos, E. Holland & P. Ebener, "The Legal and Economic Consequences of Wrongful Termination" at 40–45 (Rand Corp. 1988).

[28] Id. at 37, 40, 47.

[29] Id. at 39.

get to trial; moreover, those cases still pending at the time of the study's publication had already consumed, on average, another two years and four months in post-trial and appellate processes.[30]

Allowing an employer and employee to settle their disputes in a previously agreed upon arbitral forum would not only expedite their resolution and reduce a source of mounting pressures on our courts, but would reduce transactional costs to plaintiff and defendant alike. Indeed, if this Court refuses to allow enforcement of predispute arbitration agreements as to statutory employment claims, the Court would create an anomalous and inefficient situation whereby certain of an employee's claims against his employer would be heard in arbitration, while others, quite possibly involving the same facts, would be resolved some time later in court.

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[30] Id. at 24–25.

II.

GARDNER-DENVER DOES NOT PRECLUDE ENFORCEMENT OF AN INDIVIDUAL EMPLOYEE'S AGREEMENT TO ARBITRATE.

The holding in Gardner-Denver that a union employee could have his Title VII claims heard de novo in court despite a prior arbitration award resolving them, was extended to alleged violations of the Fair Labor Standards Act in Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981), and to a claim under 42 U.S.C. §1983 in McDonald v. City of West Branch, 466 U.S. 284 (1984). These 1974-84 "First Decade" cases have stood as the major impediment to the enforcement in federal court of predispute arbitration agreements in employment contracts.

In more recent decisions, the 1985-to-present "Second Decade" cases, however, this Court, in embracing arbitration of key statutory rights, has all but expressly limited the reach of Gardner-Denver, a task which we respectfully request it to conclude in this case.

In Mitsubishi Motors Corp., 473 U.S. 614, 628 (1985), this Court compelled arbitration of antitrust claims and announced the controlling rule -- parties should be held to an agreement to arbitrate "unless Congress . . . has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Two years later, in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), this Court compelled arbitration of claims under the 1934 Securities and Exchange Act and SEC rule 10b-5 and under the Racketeer Influenced and Corrupt Organizations Act (RICO); and in Perry v. Thomas, 482 U.S. 483 (1987), held that the Federal Arbitration Act preempted a provision of California labor law which permitted wage collection actions to be heard in court regardless of a private agreement to arbitrate. Thereafter, in Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989), the Court extended its enforcement of arbitration agreements to a claim under the 1933 Securities Exchange Act. Finally, in its latest pronouncement, the Court, without opinion, vacated and remanded a decision of the Court of Appeals for the Second Circuit which had denied

enforcement to a predispute agreement to arbitrate a claim under the Employee Retirement Income Security Act.[31]

A. THE JUDICIAL CLIMATE HAS CHANGED.

First, Gardner-Denver, Barrentine and McDonald, all cases arising in the context of arbitration under collective bargaining agreements, did not mention, much less analyze, the Federal Arbitration Act. Though Gardner-Denver and its First-Decade progeny did not arise by virtue of a motion to compel arbitration and thus are procedurally distinguishable from the Second-Decade cases, Mitsubishi Motors Corp., McMahon, Perry and Rodriguez de Quijas, the First-Decade cases unnecessarily limited the effectiveness of private agreements to arbitrate and the policies underlying the FAA by allowing de novo judicial redeterminations of the same matters. In the context of the First-Decade cases, this Court was not concerned with enforcing what it has since repeatedly stated to be the "federal policy favoring

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[31] Bird v. Shearson Lehman/American Express, Inc., 871 F.2d 292 (2d Cir.), vacated and remanded, 110 S. Ct. 225 (1989), remanded mem. op., No. 88-7704 (2d Cir. Jan. 19, 1990).

arbitration,"[32] which requires that the courts "rigorously enforce agreements to arbitrate."[33] In this Second Decade, the Court has consistently emphasized that the Federal Arbitration Act "is at bottom a policy guaranteeing the enforcement of private contractual arrangements,"[34] and that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered."[35]

Second, the judicial hostility openly displayed in Gardner-Denver and its progeny towards arbitration as an inferior means of resolving statutory claims is no longer permissible. Arbitrators are no longer deemed incapable of resolving such disputes. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[36] Indeed, in recently overruling

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[32] McMahon, 482 U.S. 220, 226 (1987).

[33] Id. at 226 (1987).

[34] Mitsubishi Motors Corp., 473 U.S., 614, 625 (1985).

[35] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

[36] Mitsubishi Motors Corp., 473 U.S. at 626-27 (1985).

Wilko v. Swan, 346 U.S. 427 (1953),[37] a decision cited favorably in Gardner-Denver,[38] this Court wiped away its initial and longest standing deprecation of arbitration.

Third, the Court now views an agreement to arbitrate as a forum selection device. Unlike the tack it took in Gardner-Denver, this Court no longer views an agreement to arbitrate as a relinquishment of substantive rights:

> "[A] concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read. By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the

[37] Rodriguez de Quijas, 109 S. Ct. 1917, 1922 (1989).

[38] Gardner-Denver, 415 U.S. at 52 (1974).

> simplicity, informality, and expedition of arbitration."[39]

Fourth, in Gardner-Denver, the Court took the view that claims relating to statutory rights must be resolved in the courts. Now, instead, the presumption is in favor of enforcing agreements to arbitrate these claims. In fact, the burden is on the party opposing arbitration to demonstrate that Congress expressed an intent to preclude waiver of the judicial forum.[40]

B. FACTUAL DISTINCTIONS BETWEEN COLLECTIVELY BARGAINED AND INDIVIDUAL ARBITRATION AGREEMENTS ARE CONTROLLING.

Gardner-Denver, Barrentine and McDonald all involved arbitration under collective bargaining agreements. In those cases, this Court was concerned that fundamental employee rights may not receive adequate protection since individual rights could be subordinated to the overall interests of the bargaining unit.[41] In the collective bargaining context, all the union owed was

[39] Mitsubishi Motors Corp., 473 U.S. at 628 (1985).

[40] McMahon, 482 U.S. 220, 227 (1987).

[41] Gardner-Denver, 415 U.S. 36, 58 n.19 (1974); Barrentine, 450 U.S. 728, 742 (1981); McDonald, 466 U.S. 284, 291 (1984).

a duty of fair representation,[42] not fairest representation. In the context of individually bargained agreements to arbitrate, the employee is not represented by a union and instead controls his own representation; thus, this problem of potentially competing interests is resolved.

In addition, under Gardner-Denver's rationale, the Court was concerned that an arbitrator acting under the authority of a collective bargaining agreement had the duty to interpret that contract only and was not able to apply general or statutory law to the contrary.[43] Yet again, where an individual employee's agreement to arbitrate, as in the instant case, does not restrict consideration of statutory law or, as in CPR's Model Procedure, affirmatively compels its consideration, the arbitrator is entirely free to apply relevant statutory law, thus fully protecting employee rights.[44]

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[42] See Vaca v. Sipes, 386 U.S. 171 (1967).

[43] Gardner-Denver, 415 U.S. 36, 56-57 (1974); Barrentine, 450 U.S. 728, 744 (1981); McDonald, 466 U.S. 284, 290-291 (1984).

[44] See R. Coulson, "Employment Contracts: The Misunderstood Labor Cases," N.Y.L.J. at 3, col. 3 (Jan. 12, 1990), in which Mr. Coulson, (continued...)

III.

PREDISPUTE ARBITRATION AGREEMENTS SHOULD BE ENFORCED AS TO ADEA DISPUTES.

A. THE FOURTH CIRCUIT'S REASONING IS CORRECT.

It is clear that, despite the many opportunities which Congress has had to express itself in enacting and amending the ADEA, no Congressional intent relating to arbitration may be discerned from either the text or legislative history of that statute.[45] Nevertheless, despite the strong federal policy favoring arbitration as expressed in the FAA, the Third Circuit disregarded this

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[44](...continued)
President of the American Arbitration Association, explained that Gardner-Denver and progeny should be limited to the collective bargaining context.

[45] On this point, there is no dispute. Nicholson v. CPC International, Inc., 877 F.2d 221, 225 (3d Cir. 1989); Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990). The absence of Congressional intent is confirmed by an independent in-depth study of the ADEA's legislative history performed by CPR counsel's office. Congress's silence in the "Older Workers Benefit Protection Act," Pub. L. 101-433 (1990), in the face of the well-publicized arbitration issue in this case, however, is evidence that it has no aversion to the arbitration of ADEA claims.

mandate on the basis of shaky inferences.[46] Citing to the role of the EEOC in ADEA enforcement, it simply presumed that Congress did not want ADEA claims in arbitration because that could eliminate EEOC enforcement, since no charge of discrimination would be filed.[47] An individual, however, may settle his ADEA claim without EEOC involvement,[48] and there is

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[46] Nicholson v. CPC International, Inc., 877 F.2d 221 (3d Cir. 1989), aff'g 46 Fair Empl. Prac. Cas. (BNA) 1019 (D.N.J. 1988) (Sarokin, J.).

[47] The EEOC always retains the power to conduct investigations on its own initiative, 29 C.F.R. § 1626.4, and this holds regardless of any agreement an individual may sign. Likewise, the EEOC retains the independent authority to bring suit to remedy instances of alleged age discrimination. See 29 U.S.C. § 626(b); 29 C.F.R. §§ 1626.4, 1626.13; see also EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) (employee who signed waiver of claims under ADEA could not waive right to file charge of discrimination with EEOC which retained power to seek injunction against company for unlawful conduct in violation of ADEA). This principle is reconfirmed in the "Older Workers Benefit Protection Act," Pub. L. 101-433, Title II, Section 201(f)(4) (1990) ("[n]o waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.").

[48] Indeed, under the "Older Workers Benefit Protection Act," Pub. L. 101-433, Title II (1990), an individual may validly waive a right or (continued...)

no reason why a private agreement to settle a matter using agreed upon procedures should be viewed as being deficient, so long as the individual employee is not precluded from filing a complaint of discrimination with the EEOC.

The very fact that the EEOC, an administrative agency, plays a role in the enforcement of the ADEA coupled with the grant of concurrent jurisdiction to both federal and state courts[49] demonstrates that Congress felt the resolution of ADEA claims need not be confined to any one place. The emphasis is on the vindication of ADEA rights, not on the forum to be used.[50] Indeed the ADEA itself directs the EEOC, in the first instance, to

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[48](...continued)
claim under the ADEA without any involvement by the EEOC. The EEOC itself, in its fiscal year 1989, only directly participated or intervened in 133 lawsuits under the ADEA, although it received to process 14,789 charges of age discrimination. U.S. Equal Employment Opportunity Commission, Office of General Counsel, Litigation Statistics FY 1980 - FY 1989 (1/90).

[49] 29 U.S.C. § 626(c).

[50] By analogy, this concept was reinforced in Yellow Freight Sys., Inc. v. Donnelly, 110 S. Ct. 1566 (1990), where this Court unanimously held that Title VII plaintiffs could proceed in either federal or state court, in the absence of any express statutory mandate precluding such.

seek to resolve disputes through informal methods of conciliation, conference and persuasion.[51]

In the appropriate case, not present here, the question of whether the predispute arbitration agreement was entered into by the plaintiff voluntarily and knowingly may have to be resolved before the agreement to arbitrate may be enforced. Whatever the level of sophistication or actual bargaining power of the employee, however, there must be no blanket presumption against enforcement, since arbitration would have been an openly and specifically stated and known condition of employment.[52]

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[51] 29 U.S.C. § 626(d)(2).

[52] See, e.g., Model Agreement at App. A-16-41. Also, market forces will ensure that employers adopt basically sound and fair systems, such as the Model Procedure, since employees can be expected to view such a procedure as an important term of employment and the more equitable a company's procedure, the more numerous and qualified its applicants and the more satisfied and productive its employees. See A.F. Westin & A.G. Feliu, "Resolving Employment Disputes Without Litigation" 49-58 (Bureau of National Affairs 1988).

B. THE "OLDER WORKERS BENEFIT PROTECTION ACT" DOES NOT PRECLUDE ENFORCEMENT OF PREDISPUTE ARBITRATION AGREEMENTS.

On October 17, 1990, President Bush signed into law the "Older Workers Benefit Protection Act," Pub. L. 101-433, which amends the ADEA and, under Title II, Section 201, sets forth detailed requirements which must be met in order effectively to waive ADEA rights. Certainly, a predispute agreement to arbitrate akin to CPR's Model Agreement and Model Procedure is still enforceable since an employee, by agreeing first to arbitrate a dispute, would not be relinquishing his right later to proceed in court on the ADEA claim, with jury trial if desired.[53]

Notwithstanding this point, the resolution of the instant case is unaffected by the "Older Workers Benefit Protection Act" since Title II, Section 201 does not apply to waivers which occurred before that statute's date of enactment.[54] Accordingly, if

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[53] Model Procedure, Articles Two at App. A-23 and Twenty-Three at App. A-39, and their Commentary at App. A-44-48, App. A-62-63. There is no prospective "waiver" of the right to a jury trial under the ADEA where the employee defers that right.

[54] "Older Workers Benefit Protection Act," Pub. L. 101-433, Title II, Section 202(a) (1990).

Mr. Gilmer waived any rights, he did so validly insofar as the "Older Workers Benefit Protection Act" is concerned.

IV.

TO THE EXTENT GARDNER-DENVER STILL CONTROLS -- ITS FOOTNOTE 21 ALLOWS FOR THE ENFORCEMENT OF PREDISPUTE ARBITRATION AGREEMENTS.

In an often overlooked footnote, the Gardner-Denver Court expressed its views as to the weight to be given arbitration awards:

> "We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum."[55]

Hence, even under that now outdated view of arbitration as an inferior dispute resolution mechanism, there was an opportunity to enforce arbitration awards rendered pursuant to predispute arbitration procedures which afforded the employee ample substantive and procedural protections. Under the CPR

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[55] Gardner-Denver, 415 U.S. at 60 n.21 (1974).

Model Procedure, in particular, the prerequisites of Footnote 21 should be fully met and, at the very least, "great weight" may be given to the arbitrator's resolution of a statutory claim. The arbitrator must issue a written decision, and there are provisions for discovery and full opportunity to present evidence and argument at hearing. In addition, the burden of persuasion as to claimed violations of the anti-discrimination laws would be that utilized in court. Finally, the arbitrator possesses broad remedial powers to award reinstatement and virtually complete compensation in addition to punitive or liquidated damages and attorney's fees.

At a minimum, the possibility that, in a particular case, the arbitrator may improvidently disregard the individual's ADEA protections is not sufficient reason, in the first instance, to deny enforcement of an otherwise valid agreement to arbitrate. There is ample opportunity, if necessary, to correct any arbitral error in this regard, either in a proceeding to vacate an award under the FAA, 9 U.S.C. § 10(d), or in a proceeding under the ADEA in which the court will determine the weight to be accorded the arbitrator's decision and award.

CONCLUSION

This Court has now repeatedly endorsed it, the Federal Arbitration Act commands it, practicality compels it, and the two parties agreed to it. Accordingly, there is every reason to enforce a predispute agreement to arbitrate statutory claims, including a claim under the ADEA. For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

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Dated: December 19, 1990

APPENDIX A

MODEL ADR PROCEDURES

EMPLOYMENT TERMINATION DISPUTE RESOLUTION AGREEMENT AND PROCEDURE

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CPR EMPLOYMENT DISPUTES COMMITTEE

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INTRODUCTION

In 1987, the CPR Employment Disputes Committee prepared two model procedures for the resolution of employment disputes. Both procedures -- the "CPR Model Procedure for Mediation of Termination and Other Disputes" and the "CPR Model Procedure for Employment Termination Dispute Adjudication" -- were intended for application, by agreement between the parties, *after* the dispute had arisen. Following publication of these post-dispute procedures, the Committee tackled the more sensitive and challenging task of constructing a comprehensive procedure which could be implemented on a ***pre-dispute*** basis to resolve employment claims, whether based on contractual, common law or statutory principles. Its objective was to construct a fair, private, expeditious, economical and final procedure, less burdensome or adversarial than litigation, which any private employer could implement, at the inception of employment or upon sufficient advance notice to employees, through use of a standardized pre-dispute arbitration agreement.

The Committee delegated initial study and drafting to a subcommittee of Jay W. Waks (chairman), Alfred G. Feliu, Bruce McLanahan and Wayne N. Outten. The subcommittee focused initially on disputes in regard to employment termination, and its work culminated in the Committee's approval of two models, the texts of which are contained later in this report:

(1) the **Model Agreement to Submit Termination Disputes to the Model Employment Termination Dispute Resolution Procedure** (the "**Model Agreement**"); and

(2) the **Model Employment Termination Dispute Resolution Procedure** (the "**Model Procedure**").

The Committee, which includes a broad spectrum of lawyers and arbitrators in the field of employment disputes, believes that the Model Agreement and Model Procedure can serve, sometimes with appropriate modifications, the interests of employers, employees and the public in many cases. In addition, the Committee has consulted with other lawyers who represent various parties in these disputes, and most have concurred that the procedure would often be appropriate for their clients.

The Model Agreement and Model Procedure are predicated on having an executive or other employee, when hired or with ample advance notice, agree to arbitrate any dispute which might arise out of the termination of that relationship (including to prospectively waive recourse to an administrative or judicial forum). On this premise, claims of improper termination, breach of employment contract or employment discrimination, and other claims ancillary to them, could be resolved quickly, fairly, fully and finally in arbitration.

In making available the Model Agreement and Model Procedure, the Committee is mindful that, although certain court decisions beginning with *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) [1], appear to have been undermined, they remain on the books and, accordingly, an employer cannot count on having pre-dispute arbitration agreements enforced in all circumstances

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[1] In *Alexander v. Gardner-Denver*, the Court held that an employee, whose claim of employment discrimination is subject to compulsory arbitration under a collective bargaining agreement, is not precluded from suing in court under Title VII of the Civil Rights Act of 1964. In its footnote 21, the Court explained, however, that the arbitrator's decision, although not final, may be entitled to appropriate weight (415 U.S. at 60 n.21).

(see the Model Procedure's commentary to Article Two). The arbitrability under a pre-dispute agreement of a claim of age discrimination is scheduled for argument in early 1991 before the United States Supreme Court. *Gilmer v. Interstate/Johnson Lane Corp.*, cert. granted 59 U.S.L.W. 3212 (Oct. 1, 1990). The Committee believes that, ultimately, this type of agreement and procedure is likely to be held to be enforceable under the Federal Arbitration Act and, in any event, should dispose of most cases as a practical matter.

SUMMARY [2]

The Model Procedure is predicated on the Model Agreement and sets out the rules by which any controversy over the termination of employment, including discrimination issues, would be resolved in arbitration. An employee who signs the Model Agreement would be agreeing to have arbitration of these disputes governed by the Model Procedure. They could be used

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[2] This summary is adapted from the article by J. W. Waks and L. Ginsberg, "Arbitrating Executive and Other Employment Disputes: Let's Put A Pin In Gardner-Denver!" to be published in *Proceedings of New York University's 43rd National Conference on Labor* (Little, Brown 1990).

when hiring particular executives or made applicable generally to all employees or selectively to some, as a matter of corporate policy. The Model Procedure itself provides that an employer may cancel the Model Agreement and Model Procedure on 180 days' written notice to the signatory employee.

The Model Procedure is designed to relate only to employment terminations, though it may easily be adapted to include other types of employment claims. Initially, the term "dispute" is defined broadly so it encompasses all manner of claims arising out of an employment termination. This is to force them into arbitration at the same time and ensure their resolution in a single proceeding.

In addition, all claims which can be brought under the Model Procedure must be so brought first, even if recourse to a judicial or administrative forum is preserved by law. Thus, the doctrine of exhaustion of remedies is of key importance to the Model Procedure.

Furthermore, by employee-employer agreement, resolution of any dispute pursuant to the Model Procedure is to be final and binding, or if not, to be accorded the fullest weight

permitted by law. This should result in the efficient, cost-effective resolution of employment termination disputes, be they based on statutory, common law or contractual protections.

All claims involving a particular termination are heard by a single "adjudicator", who will be selected by agreement between the parties, if possible. Otherwise, the adjudicator will be an attorney with experience in employment disputes selected from the American Arbitration Association commercial arbitration panel pursuant to the AAA Commercial Arbitration Rules.

An employee must commence the Model Procedure within 180 days after written notice of the termination, unless a dispute over a deferred or later awarded bonus is involved, in which case the period runs from the time the terminated employee receives or is notified of a denial of compensation. This provision is intended to achieve an expeditious resolution of claims.

Limited discovery involving the exchange of documents is permitted though it is confined to that which is relevant and for which each party has a "substantial, demonstrable need". The employee is expressly granted the right to depose one employer representative on the assumption that the employer has

greater access to the reasons for termination. The employee is also entitled to review his or her personnel record unless, upon a showing of good cause, the adjudicator excludes certain confidential matters. Although some management counsel may bridle at the thought of even this limited discovery permitted a discharged employee, it serves the important purpose of ensuring the procedure's acceptability by employees and by the courts, especially in cases challenging the fairness of the procedure in adjudicating statutory claims.

The employee bears the burden of persuasion to demonstrate that the termination was not based on any legitimate business reason, considering the nature of the employee's position and responsibilities and the employer's stated policies. Such a burden distinguishes the Model Procedure from an arbitration pursuant to a collective bargaining agreement's grievance procedure where an employer usually must prove "just cause". It instead places the burden on the employee in a manner roughly comparable to what it would be in civil rights or other employment litigation, and the commentary to the Model Procedure makes this clear. Hence, the adjudicator is expected to apply relevant statutory law,

both substantive and procedural, and if, for instance, the Civil Rights Act of 1990 were passed, the adjudicator would have to apply that law as well. Indeed, under the Federal Arbitration Act, on a motion to vacate an award issued pursuant to the Model Procedure, a party would be able to argue that an adjudicator, who failed to apply prevailing law as required by the Model Procedure, exceeded his authority.

Under another provision, all aspects of the proceeding are confidential, thus avoiding the inevitable publicity attendant to litigation which could adversely affect the terminated employee or the employer, or otherwise possibly impact the workforce.

As far as the expenses of the adjudication are concerned, the employee is required only to pay the lesser of one-half of these costs or two days' gross compensation. These include the costs of the adjudicator and filing fees (but not attorneys' fees unless the adjudicator awards them). This would make the Model Procedure more accessible to employees than would litigation.

Significantly, unlike most commercial and specialized industry arbitrations, the Model Procedure requires the

adjudicator to render a decision in writing with express findings of fact on each issue of fact raised, the rationale for the decision and, if necessary, conclusions of law and discussion of legal authorities. This requirement reflects the reality that statutory claims are often pleaded in all manner of employment litigation. Accordingly, it ensures that the decision can be reviewed in any subsequent proceeding. It would allow a reviewing court, confronted with the issue of whether the arbitral award is dispositive of statutory claims, to ensure that the adjudicator decided the matter at hand. Moreover, even if the arbitral award is not ultimately deemed final and binding as to its disposition of statutory claims, a reasoned decision could serve persuasively in another proceeding.

Of equal or perhaps greater importance, the requirement of a reasoned decision may also serve a therapeutic and deterrent function in that it guarantees the proverbial "day in court" and an explanation of exactly why the party lost in whole or part, hopefully discouraging any possible relitigation.[3]

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[3] Indeed, one study found that, even after *Gardner-Denver*, relitigation of arbitration decisions had not occurred in a majority of cases and, where it had occurred, the arbitrator was rarely contradicted. M.M. Hoyman (continued...)

The adjudicator has broad remedial powers and may award reinstatement, back pay and attorneys' fees. If reinstatement is warranted but not appropriate, up to two years' front pay may be awarded. An employee has a duty to mitigate and any award of back pay will be reduced by interim compensation and benefits, including unemployment, disability, severance and retirement benefits. In addition, the adjudicator may award up to one year in liquidated damages where appropriate. These broad powers should allay any lingering doubts that an employee's substantive rights can be protected adequately in arbitration.

A proceeding under the Model Procedure is considered to be an arbitration subject to the Federal Arbitration Act, and an award may be vacated or modified only on grounds specified in the applicable law. This assures limited judicial review of adjudications under the Model Procedure, thus promoting the finality of awards.

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[3](...continued)
& L.E. Stallworth, "Arbitrating Discrimination Grievances in the Wake of *Gardner-Denver*," BLS Monthly Labor Review at 3-10 (Oct. 1983).

In short, the Model Agreement is basically a forum selection device, and the Model Procedure ensures a fair proceeding equivalent to that provided for in a court of law, while eliminating the needless waste and delay of litigation.

Center for Public Resources

MODEL AGREEMENT TO SUBMIT TERMINATION DISPUTES TO THE MODEL EMPLOYMENT TERMINATION DISPUTE RESOLUTION PROCEDURE

Statement of Principles

Termination of an employment relationship may give rise to disputes between the Employee and the Employer. It is in their mutual interest to resolve any such disputes through a procedure that is

fair,

private,

expeditious,

economical,

final and

less burdensome or adversarial than litigation.

The Model Employment Termination Dispute Resolution Procedure (the "Model Procedure") of the Center for Public Resources was developed by a committee of leading

attorneys representing both employees and employers to achieve the above objectives.

In order for the Employee to prevail under the Model Procedure (paragraph 13-1), the Adjudicator must find that termination of employment was not based on legitimate business reasons, taking into account (a) the nature of the Employee's position and responsibilities and (b) the Employer's stated policies. (This standard generally is more favorable to the Employee than the law of most states and less favorable than the law of a small number of states.)

_____ (the "Employer") has adopted and agrees to follow the Model Procedure in the event of a dispute with a terminated Employee and expects its Employees to similarly agree by signing this document (the "Model Agreement").

The Model Agreement and the Model Procedure affect significant legal rights. The Employee is advised to consult legal counsel before signing the Model Agreement.

The Model Agreement

I agree that all Disputes, as that term is defined in Article One of the Model Procedure, will be determined under the Model Procedure.

On _____, I received a copy of this Model Agreement and the Model Procedure. I understand that I am entitled to receive a copy of the signed Model Agreement.

I have had at least 72 hours (excluding weekends and holidays) before signing this Agreement to read the Model Agreement and Model Procedure and to consult legal counsel about them.

I have read and understand the Model Agreement and Model Procedure.

I understand and agree that:

1. It is a material condition of my employment that I agree to the Model Agreement and Model Procedure.
2. I will first raise pursuant to the Model Procedure any claim against the Employer I may have regarding the termination of my employment (including any claim of

constructive termination), even if I may also file a legal action based on that claim in another forum.

3. I must file my claim under the Model Procedure within 180 days of my being notified by the Employer of its decision to terminate my employment.
4. Any award rendered by the Adjudicator is final and binding upon both me and the Employer.
5. The Employer may cancel the Model Procedure at any time on 180 days' written notice to me.
6. Should this Model Agreement or the Model Procedure be held unenforceable in whole or in part or be cancelled, my employment will be "at-will" to the extent permitted by applicable law. (The term "at-will" employment means that either the Employee or the Employer may terminate the

employment at any time, without notice, and for any or no reason. Certain federal and state laws, however, limit the reasons for which the Employer may terminate "at-will" employees.)

7. The provisions of the Model Procedure, and not any summary thereof, shall control.

AGREED:

_____
(Type or print name of Applicant or Employee)

Date:_____

The Company agrees to adhere to the Model Agreement and the Model Procedure in connection with the employment of the Employee whose signature appears above.

(NAME OF COMPANY)

BY:_____

Date:_____

Center For Public Resources

MODEL EMPLOYMENT TERMINATION DISPUTE RESOLUTION PROCEDURE

Pursuant to the Model Agreement, the Employee and the Employer (collectively, the "Parties") agree to submit for resolution as provided for in this Model Employment Termination Dispute Resolution Procedure (the "Model Procedure"), any employment termination Dispute (as this term is defined below).

ARTICLES

ONE: Disputes (and Parties) Subject to Model Procedure

1-1. The term "Dispute", whether in the singular or plural, means (a) all claims, disputes or issues of which the Employee is or should be aware and which are directly related to or arise out of the termination of the employment of the Employee by the Employer (including any claim of constructive termination), *and* (b) all Employer counterclaims against that Employee of which the Employer is or should have been aware prior to the termination.

1-2. The term "Employer" means the employer of the Employee and its parent company, subsidiaries and affiliates and their respective directors, officers, employees and agents.

1-3. All Disputes are subject to this Model Procedure.

TWO: Exclusivity, Exhaustion, Waiver and Binding Effect

2-1. All Disputes shall be presented for resolution pursuant to this Model Procedure.

2-2. Resolution of any Dispute pursuant to the Model Procedure is intended to be final and binding on the Parties to the extent permitted by law.

2-3. Even if not found to be final and binding, the Award of the Adjudicator shall be accorded the fullest weight permitted by law.

2-4. The failure of an Employee to initiate the Model Procedure within the time limits set forth in Article Four shall be deemed a waiver and release by that Employee of the Employer with respect to any Disputes relative to that Employee, unless the right to pursue a statutory claim or remedy is preserved by law.

2-5. Once an Employee initiates the Model Procedure to adjudicate a Dispute, the failure of the Employer to state a counterclaim of which the Employer is or should have been aware prior to an Employee's termination, within the time limit of paragraph 6-3, shall be deemed a waiver and release by the Employer of that Employee with respect to that counterclaim, unless the right to pursue a statutory claim or remedy is preserved by law.

2-6. The Parties shall be precluded from bringing or raising in court or before another forum any Dispute which could have been brought or raised pursuant to this Model Procedure, unless the right to pursue a statutory claim or remedy is expressly preserved by law.

2-7. Prior to receiving an Award of the Adjudicator, neither Party shall seek to enjoin any proceeding pursuant to the Model Procedure on the basis that the Award would not be enforceable.

THREE: Distribution of Model Procedure

3-1. The Employer will give a copy of the executed Model Agreement and the Model Procedure to the Employee (a) at the commencement of employment or at the time

of the adoption of the Model Procedure, and (b) within 5 days after the Employee is given written notice of the decision to terminate employment.

FOUR: Time Limit To Initiate Model Procedure

4-1. An Employee must initiate the Model Procedure pursuant to Article Six within 180 days after the Employee is given written notice of the decision to terminate his or her employment, except that an Employee must initiate the Model Procedure with respect to any Dispute over deferred or later awarded or calculated compensation or bonus within 180 days after the Employee receives it or is notified in writing that it is denied.

4-2. If the Employer fails to comply with paragraph 3-1(b) as to the Employee, that Employee's time limit to initiate the Model Procedure shall be extended from 180 days to 1 year.

FIVE: Representation

5-1. The Parties may be represented by counsel or by any individual of their choice.

SIX: Initiation of Model Procedure and Time Limit for Counterclaims

6-1. To initiate the Model Procedure to adjudicate a Dispute, the Employee shall give written notice to the _____ Department of the Employer and to any person who is alleged to have committed the act or made the omission which is the basis of the Dispute.

6-2. The notice shall state the nature of the Employee's claim and the address which the Employee will use for the purpose of the Model Procedure.

6-3. Within 20 days after the Employee's notice is given, the Employer shall give the Employee a statement of the reasons for termination and any pre-termination counterclaims then known to the Employer.

6-4. Within 20 days after the Employer's counterclaims are given, the Employee shall give the Employer a statement of the Employee's defenses thereto.

SEVEN: Timing and Method of Giving Notice

7-1. Any notice, commencing with notice given pursuant to Article Six, shall be deemed given for the purposes of

the Model Procedure upon delivery by hand or, if mailed, by depositing the notice in a postage-paid envelope, return receipt requested, in a U.S. Postal Service deposit box regularly maintained for this purpose.

7-2. Delivery by hand shall be to a person of suitable age and discretion at the office or address specified in paragraph 7-3. Delivery by hand shall include delivery by a non-U.S. Postal Service package delivery service which provides a return receipt as proof of delivery.

7-3. The Employer shall use the address last listed by the Employee with the Employer for income tax withholding in order to give the Employee the materials according to Article Three. For all other purposes, the Employee's address pursuant to Article Six shall be used.

7-4. The production of an affidavit of service, signed and dated acknowledgement of receipt or a signed and dated return receipt shall be adequate proof to presume delivery.

EIGHT: The Adjudicator

8-1. Any Dispute will be decided by a single decisionmaker, called the "Adjudicator".

8-2. The Parties will attempt to agree on the selection of the Adjudicator. If the Parties cannot promptly so agree, the Adjudicator will be chosen pursuant to Rule 13 of the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and shall be an attorney who is a member of the AAA commercial arbitration panel with experience in employment disputes. Either party may request the AAA's assistance through its regional office responsible for the venue specified in paragraph 9-1. The functions of the AAA shall be limited to assistance in selection of the Adjudicator in accordance with this paragraph, and the AAA's Commercial Arbitration Rules shall not otherwise apply. At the request of the Employee, the AAA's filing fee, normally payable at the time a case is filed, shall be advanced by the Employer, subject to apportionment pursuant to Articles Sixteen and Nineteen.

8-3. Unless the parties agree otherwise, all Disputes related to the Employee shall be submitted in the same

proceeding to the Adjudicator selected pursuant to this Article Eight.

8-4. The Adjudicator shall not be liable to either Party for any act or omission in connection with the proceeding. Neither Party shall sue, join, subpoena or in any manner otherwise involve in any action or proceeding the Adjudicator, unless the right to so involve the Adjudicator is expressly preserved by statute.

NINE: Venue and Place of Hearing

9-1. The venue of any Dispute shall be the county in which the Employee performed the principal duties of his or her job.

9-2. Unless the Parties otherwise agree or the Adjudicator otherwise directs for good reason, any hearing shall be conducted and the adjudication shall be deemed held in that county of venue.

TEN: Discovery

10-1. The Parties shall cooperate in the voluntary exchange of such documents and information as will serve to expedite the adjudication.

10-2. Discovery shall be conducted in the most expeditious and cost-effective manner possible, and shall be limited to that which is relevant and for which each Party has a substantial, demonstrable need.

10-3. Upon request, either Party shall be entitled to receive, prior to the hearing, copies of documents subject to discovery. Upon request, the Employee shall also be entitled to a true copy of his or her personnel records kept in the ordinary course of business and pursuant to Employer policy, other than records relating to pre-employment procedures, subject to any condition or limitation imposed by the Adjudicator upon a showing of good cause.

10-4. Upon request, the Employee shall be entitled to take at least one deposition of an Employer representative designated by the Employee.

10-5. Any disputes relative to discovery shall be presented to the Adjudicator for final and binding resolution.

10-6. The Adjudicator may grant, upon good cause shown, either Party's request for discovery in addition to or limiting that for which this Article Ten expressly provides.

ELEVEN: Subpoenas

11-1. Counsel may issue subpoenas of witnesses or documents to the extent permitted in a judicial proceeding.

11-2. The Adjudicator is empowered to subpoena witnesses or documents to the extent permitted in a judicial proceeding, upon his or her own initiative or the request of a Party.

11-3. Unless the Adjudicator directs otherwise pursuant to Articles Nineteen or Twenty, the Party requesting the production of any witness or proof shall bear the costs of such production.

TWELVE: Order of Presentation

12-1. At the hearing, the Employer shall first present its evidence as to the Dispute over termination.

12-2. The order of presentation as to any other issue shall be determined by the Adjudicator.

THIRTEEN: Standard and Burden of Persuasion

13-1. In order for the Employee to prevail on any Dispute over termination, the Employee shall demonstrate that the termination was not based on any legitimate business reason, taking

into account (a) the nature of the Employee's position and responsibilities, and (b) the Employer's stated policies.

13-2. Each Party bears the burden of persuasion on any claim or counterclaim raised by that Party under the Model Procedure.

FOURTEEN: Evidence and Argument

14-1. The Adjudicator shall afford each Party a full and fair opportunity to present any relevant proof, to call and cross-examine witnesses and to present its argument.

14-2. The Adjudicator shall not be bound by any formal rules of evidence with the exception of applicable law with respect to attorney-client privilege and work product.

14-3. The Adjudicator shall decide the relevancy of the evidence offered, and the Adjudicator's decision on any question of evidence or argument shall be final and binding.

FIFTEEN: Confidentiality

15-1. All aspects of the adjudication pursuant to the Model Procedure, including the hearing and record of the proceeding, are confidential and shall not be open to the public, except (a) to the extent both Parties agree otherwise in writing, (b) as may

be appropriate in any subsequent proceedings between the Parties, or (c) as may otherwise be appropriate in response to a governmental agency or legal process.

15-2. The Employee or counsel for the Employee shall be entitled to review copies of relevant Awards rendered within 1 year preceding initiation of the Model Procedure, from which copies the Employer shall redact names and sensitive or confidential information. The Employee and counsel shall hold in confidence information regarding a prior adjudication and Award.

SIXTEEN: Expenses

16-1. The Employee shall bear the reasonable expenses of the adjudication up to the lesser of (a) one-half these expenses or (b) 2 days' gross cash compensation (including bonuses, commissions and related cash compensation) of the Employee during the 12 months immediately preceding the notice of claim. The Employer shall bear the remainder of these expenses.

16-3. The "expenses of the adjudication", to which this Article Sixteen refers, shall mean the expenses of the Adjudicator (such as daily fee and travel), filing fee, and the cost of producing at the direction of the Adjudicator any witnesses or

proof, and shall exclude the Parties' respective attorneys' fees and disbursements, expenses of witnesses and costs of producing other evidence.

SEVENTEEN: The Award

17-1. The Adjudicator shall render his or her decision and award (collectively the "Award") based solely on the evidence and authorities presented, the policies and practices of the Employer, the applicable law argued by the Parties, and the provisions of the Model Procedure as interpreted by the Adjudicator.

17-2. The Award shall be in writing and signed and dated by the Adjudicator and shall contain express findings of fact (including findings on each issue of fact raised by a Party), the rationale for the Award and, if necessary to dispose of any issues of law, conclusions of law and discussions of legal authorities. The Adjudicator shall give signed duplicate original copies of the Award to both Parties.

17-3. The Award may be entered as a judgment in any court of competent jurisdiction.

17-4. Unless applicable law provides otherwise, the Award shall be final and binding and not subject to review or appeal.

EIGHTEEN: Record of Proceeding

18-1. A record of the hearing shall be made, at the election and expense of the Employer, by audio or video taping or by verbatim transcription.

18-2. The Adjudicator shall be responsible, in cooperation with the Parties, for assembling the record of the proceeding and shall maintain possession of that record for at least 1 year after issuing the Award, unless the Parties, with the Adjudicator's consent, agree otherwise.

18-3. The record of the proceeding shall include at a minimum the following: distribution pursuant to Article Three; the notice and any statements required by Article Six; any documents and depositions discovered pursuant to Article Ten; any evidence and argument (including any briefs) submitted pursuant to Article Fourteen; the record of the hearing pursuant to paragraph 18-1; and the Award pursuant to Article Seventeen.

NINETEEN: Damages and Relief

19-1. Upon a finding that the Employee has sustained his or her burden of persuasion, the Adjudicator may grant such relief as may be just and reasonable, including some or all of the following relief where warranted: (a) back pay (including lost benefits), less interim earnings, unemployment, retirement and disability and other benefits and severance payments received by or to be received by the Employee; (b) the expenses and costs of bringing the adjudication, if any, including reasonable attorneys' fees and costs of producing witnesses or other proof; and (c) reinstatement to the same or a substantially equivalent position with the Employer.

19-2. If reinstatement is warranted but is not reasonable or practical under the circumstances at the time the Award is issued, the Adjudicator may award to the Employee an amount equivalent to up to 2 years front pay (including benefits) from which the Adjudicator may subtract any severance payments received by or to be received by the Employee.

19-3. The computation of front pay or back pay shall be based upon, in appropriate circumstances, the Employee's

gross cash compensation including bonuses, commissions and related cash compensation.

19-4. Upon a finding that the Employer has sustained its burden of persuasion on any counterclaim, the Adjudicator may award such monetary and/or injunctive relief as may be just and reasonable.

19-5. In the Award, the Adjudicator may direct the payment, as liquidated damages, of up to 1 year of gross cash compensation in addition to other remedies described above under circumstances in which punitive, special or compensatory damages would be awardable under applicable law in the jurisdiction.

19-6. Both Parties have a duty to mitigate their damages by all reasonable means, including in the case of the Employee mitigation by way of making application for unemployment, disability, retirement or other available benefits. The Adjudicator shall take a Party's failure to mitigate into account in granting relief pursuant to Articles Nineteen and Twenty.

19-7. The Award of any damages or relief provided for in Articles Nineteen and Twenty is left to the

discretion of the Adjudicator and may be made in a bifurcated proceeding.

TWENTY: Sanctions

20-1. The Adjudicator may award either Party its reasonable attorneys' fees and costs, including reasonable expenses associated with production of witnesses or proof, upon a finding that the claim or counterclaim was frivolous or brought solely to harass the Employee, the Employer or the Employer's personnel.

20-2. The Adjudicator may award either Party its reasonable attorneys' fees and costs, including reasonable expenses associated with production of witnesses or proof, upon a finding that the other Party (a) engaged in unreasonable delay, (b) failed to comply with the Adjudicator's discovery order, or (c) failed to comply with requirements of confidentiality under the Model Procedure.

TWENTY-ONE: Arbitration Statute

21-1. Any proceeding pursuant to the Model Procedure shall be an arbitration proceeding subject to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, if applicable, or, otherwise, to the law of the state of venue.

21-2. The Adjudicator shall have all powers granted to arbitrators and the Adjudicator's Award shall be enforceable as would an arbitrator's award, pursuant to the applicable statute.

21-3. If any part of the Model Procedure is in conflict with any mandatory requirement of applicable law, the statute shall govern, and that part shall be reformed and construed to the maximum extent possible in conformance with the applicable law. The Model Procedure shall remain otherwise unaffected and enforceable.

21-4. The Award may be vacated or modified only on the grounds specified in the applicable law.

TWENTY-TWO: Voluntary Use of Model Procedure

22-1. After a claim, dispute or issue has arisen, the Parties may agree in writing voluntarily to employ these Model Procedures to hear and resolve with finality that claim, dispute or issue although (a) it is not related to termination of the Employee, or (b) it is not clear that the claim is, by law, subject to final and binding arbitration.

TWENTY-THREE: Court and Administrative Proceedings

23-1. Nothing in the Model Procedure shall prevent a Party from pursuing a statutory right which is preserved by law or from bringing a proceeding pursuant to the applicable arbitration statute to vacate or enforce an Award or to compel arbitration or seek temporary equitable relief in aid of arbitration.

23-2. Subject to paragraph 23-1, the Parties agree not to commence or pursue any litigation or administrative proceeding on any claim, dispute or issue subject to the Model Procedure and will promptly move to discontinue any such proceeding if commenced.

23-3. If any litigation or administrative proceeding is pending at the time of submission of a claim under the Model Procedure, the Party who commenced the litigation or proceeding will promptly move to discontinue it. A Party who contends that a claim, dispute or issue is not subject to final and binding resolution under the Model Procedure nonetheless shall promptly move to stay any litigation or proceeding on that claim, dispute or issue pending the Adjudicator's rendering of an Award; and if that Party fails to so move, the other Party may do so.

TWENTY-FOUR: Cancellation of Model Procedure and Reversion to At-Will Employment

24-1. The Employer may cancel the Model Agreement and Model Procedure on 180 days' written notice to the signatory Employee, although the Procedure shall still apply to any Dispute arising before the cancellation takes effect.

24-2. Should the Model Procedure or the Model Agreement be cancelled pursuant to paragraph 24-1 or be held unenforceable in whole or in part, the employment relationship between the Employer and the Employee reverts back to an employment-at-will relationship to the extent permitted by the applicable law then in effect.

TWENTY-FIVE: Revision of Model Procedure

25-1. The Parties to a Dispute for which the Model Procedure has been initiated may agree in writing to vary the Model Procedure at any time before the Adjudicator gives copies of the Award to both Parties.

TWENTY-SIX: Center For Public Resources

26-1. In preparing and disseminating the Model Agreement and Model Procedure, the Center for Public Resources,

Inc. ("CPR") is not rendering any legal advice or opinion and is not responsible or liable to either Party for the application or enforcement of the Model Agreement and Model Procedure to specific situations.

26-2. Neither Party shall sue, join, subpoena or in any manner otherwise involve in any action or proceeding the CPR and anyone affiliated with the CPR in connection with the application or enforcement of the Model Agreement or Model Procedure.

TWENTY-SEVEN: Effectuation of Purpose

27-1. The Model Procedure shall be construed in a manner which is consistent with its Commentary, and the provisions of the Model Agreement and of the Model Procedure and its Commentary shall be broadly interpreted and applied so as to effectuate their purpose and spirit.

Center For Public Resources

COMMENTARY ON MODEL EMPLOYMENT TERMINATION DISPUTE RESOLUTION PROCEDURE

COMMENTARY ON ARTICLES

ONE: Disputes (and Parties) Subject to Model Procedure

The Model Procedure is intended to be interpreted broadly and would encompass, to the fullest extent permitted by law, claims under any contract or the federal, state or local decisional law, statutes, regulations or constitutions. The rule of paragraph 1-2 is both procedural and substantive, in order to promote the streamlined resolution of all issues related to the terminated Employee.

Disputes between the Parties beyond those directly related to the termination decision (for example, claims for compensation or other monies owed and due as a consequence of the termination) are properly submitted for adjudication under this Model Procedure. This applies to both Employee and Employer claims. As a consequence, the enforceability of this Model Procedure may not be challenged on the grounds of a lack of

mutuality. *See Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 535 N.E.2d 643, 538 N.Y.S.2d 513 (1989). As an example, a defamation claim must be submitted under the Model Procedure if it arises out of the decision to terminate, just as would a claim that the termination violates a civil rights or whistleblower statute.

Claims relating to previous employment actions (*e.g.*, disciplinary action or denial of salary increases in previous years), however, may not be submitted because they do not *directly* relate to the final disciplinary step of termination. Certain claims arising out of post-termination conduct, such as employment references, may be subject to the Model Procedure (unless the Parties agree otherwise). *See Fleck v. E.F. Hutton Group*, 891 F. 2d 1047 (2d Cir. 1989)(post-termination claims alleging defamation by a former employer, related to performance of former employee, are arbitrable under agreement referring disputes to New York Stock Exchange arbitration).

By virtue of the definition of "Employer", an aggrieved Employee is obligated to arbitrate any dispute relating to termination which he or she may have with another employee, including a supervisor, officer or director.

Once the Employee initiates the Model Procedure, the Employer (and, by definition, any implicated employees, officers or directors) must pursue all counterclaims under the Model Procedure, so long as they arise prior to the date of termination even if they are unrelated to the termination. The Employer, however, may not initiate the Model Procedure.

Although the focus here is on employment terminations, the Employer may amend this Model Procedure to cover other employment disputes as well.

TWO: Exclusivity, Exhaustion, Waiver and Binding Effect

The Award of the Adjudicator is intended to have the fullest force and binding effect permitted by applicable federal, state or local law. This Article establishes that all claims which are cognizable and, consequently, *can* be brought under the Model Procedure *must* be brought, and that it is the intention of the Parties that all disputes related to and arising out of the termination decision may be heard and resolved only pursuant to the Model Procedure.

Clearly, where federal, state or local law prevents contractual preclusion of certain claims, or the filing of such claims,

the Model Procedure cannot displace appropriate judicial or administrative consideration. This Article, however, bars any action or claim which could have been brought pursuant to the Model Procedure, unless a court holds otherwise.

Accordingly, Article Two introduces the principle of "exhaustion of remedies", compelling use of the Model Procedure even in those situations in which the determination of the arbitrator (known here as an "Adjudicator") will not be binding, although it may be given some weight in a subsequent court or administrative proceeding. *Compare Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974) (Title VII claim is not subject to compulsory arbitration under collective bargaining agreement, but arbitrator's decision may be entitled to some weight), *Utley v. Goldman Sachs & Company*, 883 F. 2d 184 (1st Cir. 1989), *cert. denied* 110 S. Ct. 842 (1990) (court refused to enforce arbitration of Title VII claim, under New York Stock Exchange arbitration agreement), and *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989) (claim under Age Discrimination in Employment Act is not subject to compulsory arbitration under pre-dispute agreement), and *Alford v. Dean Witter Reynolds, Inc.*, 905

F.2d 104 (5th Cir. 1990) (fired broker could pursue Title VII suit for sex discrimination, rather than subject to commercial arbitration under employment agreement); *with Shearson Lehman/American Express, Inc. v. Bird*, 110 S. Ct. 225 (1989), *remanded*, mem. op., No. 88-7704 (2d Cir. Jan. 19, 1990) (Second Circuit ordered to reconsider its ruling that a private agreement to arbitrate pension fund claims is not enforceable as to claims based on substantive violations of the Employee Retiree Income Security Act of 1974), *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) (the Federal Arbitration Act requires enforcement of a private agreement between a securities firm and an investor to arbitrate claims arising under the Securities Act of 1933, just as statutory claims under the Securities Act of 1934, federal antitrust laws, and the Racketeer Influenced and Corrupt Organizations Act are subject to arbitration), *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3212 (October 1, 1990) (enforcing arbitration of age discrimination claim as being consistent with the ADEA; court expressly disagreed with Third Circuit in Nicholson case), *Hall v. Nomura Securities International*,

1990 Cal. App. LEXIS 318 (Cal. Ct. App. 1990), *motion for reconsideration denied* (Cal. Ct. App. 1990) (in reliance upon the Federal Arbitration Act, arbitration under pre-dispute agreement was properly compelled of fired employee's age and disability discrimination claims brought under California's Fair Employment and Housing Law), and *DeSapio v. Josephthal and Co.*, 143 Misc. 2d 611, 540 N.Y.S.2d 932 (Sup. Ct. N.Y. Co. 1989) (Altman, J.) (claim of disability discrimination under New York's Executive Law is referable to arbitration in an action to compel arbitration pursuant to New York's CPLR and the Federal Arbitration Act).

The law's conclusion, however, that certain claims must later be heard in another forum should not bar the initial adjudication of the same claim in the contractually-established forum. Article Two sets forth the Parties' agreement on this point, and the primacy of the Model Procedure is bolstered by Article Twenty-Three.

The enforceability of this exhaustion requirement will have to await a judicial determination. A question as to whether the Dispute is capable of being adjudicated to finality, however, should not be a basis for staying an adjudication. After

all, the Parties agree to submit all Disputes for resolution, and the Adjudicator's Award "shall be accorded the fullest weight permitted by law" as subsequently determined upon review in court or by an administrative agency.

THREE: Distribution of Model Procedure

The goal of Article Three is to ensure that these Model Procedures are communicated to the Employee both upon commencement of employment (or adoption of the Model Procedure after employment has begun) *and* at the time the Employer gives notice of termination.

FOUR: Time Limit To Initiate Model Procedure

The 180-day time limit is intended to encourage a prompt filing of claims and, consequently, an expeditious resolution of the dispute. The extension of the time limit to 1 year is designed to encourage the Employer to comply with this disclosure requirement.

FIVE: Representation

This provision places no restrictions on the Parties' selection of representatives. There may be an advantage to representation by counsel, especially in those matters in which the

application and interpretation of protective legislation, such as the civil rights laws, are at issue. Accordingly, the Employer may encourage the Employee to retain legal counsel in those matters.

EIGHT: The Adjudicator

Providing the recently terminated Employee with the option to go to a neutral organization for the selection of an Adjudicator substantially enhances the reality of fairness and the perception of it in the Employee's eyes and undoubtedly upon review in court.

It is anticipated that, upon the request of either party, the AAA will assist in selecting an Adjudicator who has the experience and qualifications desired by the Parties. Paragraph 8-2 removes any financial impediment to an Employee's seeking to select an Adjudicator with AAA assistance by requiring the Employer to advance the filing fee.

If the mutually acceptable choice of Adjudicator is not made by the Parties, the AAA ultimately will make the designation in conformance with its Commercial Arbitration Rule 13.

"If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the panel."

"Each party to the dispute shall have ten days from the mailing date in which to cross off any names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of

an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists."

Other than to appoint an Adjudicator under Rule 13, however, the AAA has no role, and neither its other rules nor its administrative fee schedule for commercial arbitration cases (other than its filing fee, currently $300.00) will apply.

If the Dispute involves a claimed violation of a civil rights or other statute, it would be prudent to select as the Adjudicator either a former judge or an attorney who has special competence and experience in the interpretation and application of that statute. The AAA must be notified of the Parties' needs in this regard.

TEN: Discovery

Article Ten guarantees limited discovery to the Parties under the supervision of the Adjudicator. The Employee is expressly provided with the opportunity to depose one Employer representative on the assumption that the Employer has more thorough access to the reasons for the termination than does the terminated Employee.

The Employee is also entitled to a copy of his or her personnel records unless the Adjudicator determines, upon a showing of good cause, to exclude certain material, such as confidential business or medical information, or the identity of confidential sources. Pre-employment records, on the other hand, ordinarily are not discoverable because of the overriding expectation of confidentiality normally afforded them. If the Dispute focused, however, upon a misrepresentation by the Employee during the pre-employment stage, such as on the Employee's application, the application would be relevant and should be produced, as ordinarily should an Employer's written report, if any, of the misrepresentation.

Because the Adjudicator may grant additional discovery, the Employer may seek, for example, the Employee's deposition and the Employee may seek pre-employment records; the moving Party, however, bears the burden of demonstrating "good cause", including the relevance of and substantial demonstrable need for the additional discovery.

The Adjudicator's resolution of any discovery dispute is not subject to judicial review. Moreover, the availability of sanctions under Article Twenty should act as an incentive to cooperate in discovery and comply promptly with an Adjudicator's decision on a discovery dispute.

TWELVE: Order of Presentation

The Employer, which presumably best knows the reasons for the termination, must present its evidence first, before the Employee puts in his or her proof regarding the termination. Article Twelve states only the order of production of evidence and is not intended to place the burden of persuasion on the Employer.

THIRTEEN: Standard and Burden of Persuasion

To prevail, the Employee must demonstrate that the Employer did not have any legitimate business reason for the

discharge. The Parties, by adopting expressly this standard, have waived any argument that another standard or burden should apply. Placing the burden of persuasion on the Employee distinguishes the Model Procedure from labor arbitration in which the Employer typically bears the burden of demonstrating that there was "just cause" for the discharge.

In deciding whether the Employee has met this burden, the Adjudicator is expected to take into account the Employee's position and responsibilities as well as the Employer's policies and applicable law. Any reason that would be a violation of Title VII of the Civil Rights Act of 1964 and other federal, state or local fair employment legislation would not be a "legitimate business reason".

The burden placed on the Employee here is roughly comparable to what would be encountered in litigation on the same claims. By way of illustration, a female Employee may claim that her discharge for a rules violation amounts to sexual discrimination unlawful under Title VII of the Civil Rights Act of 1964, in that she was fired in reality as a result of her manager's stereotypical gender-based view of her work, or perhaps because

she spurned his advances. Although this Employee may bear the initial and ultimate burden of persuasion on the termination decision, the Employee will demonstrate that the Employer had no legitimate reason to fire her if she produces direct evidence of a Title VII violation, as would be required by *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (once an employee proves that gender played a "motivating part" in an employment decision, the burden of proof shifts to the employer to prove by a "preponderance of evidence" that the decision would have been the same had such illegal discriminatory motive not played any part), or otherwise satisfies her initial burden under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and the Employer fails to introduce evidence required by those cases. See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (burden of persuasion remains with Title VII civil rights plaintiff at all times).

FOURTEEN: Evidence and Argument

Article Fourteen ensures that each Party has a full, fair, and fundamentally equal opportunity to present evidence and

argument in accordance with due process. As it is commonplace in arbitration, however, rules of evidence are not to be strictly applied. The Adjudicator's determination of relevancy, materiality, or any other evidentiary question, including on an issue of attorney–client privilege or work product, is not subject to judicial review.

FIFTEEN: Confidentiality

The proceedings are not open to the public unless otherwise agreed in writing by the Parties.

The Adjudicator's Award is kept confidential unless otherwise agreed or necessary in any subsequent proceedings between the Parties, or by a governmental agency (such as to satisfy an inquiry of the Internal Revenue Service) or other legal process (such as a valid third party subpoena).

Prior Awards, issued within the past year and relevant to the instant Dispute, are available in redacted form in subsequent proceedings, and all information about them, including that which the Employer may choose to disclose orally, must be held in confidence.

To encourage strict confidentiality, Article Twenty sanctions may be awarded for breach of Article Fifteen.

SIXTEEN: Expenses

This provision requires the Employer to bear the bulk of expenses. The Employee's fee cap of 2 days' gross compensation is minimal and should not inhibit the Employee's use of the Model Procedure. The Employer, of course, may always waive this apportionment.

Certain expenses excluded from apportionment under Article Sixteen, however, may be awarded pursuant to Article Nineteen or Twenty.

SEVENTEEN: The Award

By this provision, the Adjudicator may not take into account extraneous information or views or mete out his or her own brand of "industrial justice" in resolving Disputes under the Model Procedure.

Article Seventeen compels the Adjudicator to state findings of fact and offer bases for the decision in a writing which the Parties would be likely to consider to be dispositive of the

matters in dispute and which can be reviewed and analyzed, if permitted by law, in any subsequent proceedings.

NINETEEN: Damages and Relief

The Adjudicator may award to an Employee reinstatement, back pay, and costs and expenses, including attorneys' fees. If the Adjudicator determines that reinstatement is warranted but not reasonable or appropriate under the circumstances, front pay of up to 2 years may be awarded. Such circumstances may include a dramatic change in the nature of the work or character of the workforce in the interim period, the utter incompatibility of the Parties, or the demonstrated inability of the Parties to work together in an effective manner, or other legitimate reasons.

An Employee has a duty to mitigate damages, and any Award of back pay will be reduced by interim earnings and by unemployment, disability, severance and/or retirement or other benefits. Front pay may also be reduced by severance payments. For example, as a matter of equity or to avoid unjust enrichment, the Adjudicator may decide to reduce an award of front pay by an Employer's *ad hoc* or enhanced payment of severance pay which

the Employer had no legal obligation to make. On the other hand, the Adjudicator may find that it would be unfair to subtract from front pay severance payments made under a formal plan since the award of front pay assumes that the Employee will not be reinstated, at which point the Employee would be entitled to the severance payments already received under the terms of the plan.

The Model Procedure also recognizes that in some states the Employee, by agreeing to the Model Procedure, surrenders certain causes of action that could result in the awarding of compensatory or punitive damages. Paragraph 19-5 gives the Adjudicator the option of awarding up to 1 year in liquidated damages in circumstances where the employee might otherwise be entitled to compensatory or punitive damages under federal or state law, such as damages which may arise from an injury to reputation resulting from a defamatory statement. *Compare Fahnestock & Co., Inc. v. Waltman*, _____ F. Supp. _____, 1990 U.S. Dist. LEXIS 11024 (S.D.N.Y. 1990) (arbitration panel under New York Stock Exchange rules did not exceed their authority in awarding former manager of securities firm $50,000 for wrongful termination, $100,000 for defamation and $14,000 in attorneys'

fees; however, $100,000 punitive damages award was disallowed since, in application of *Garrity v. Lyle Stuart*, 40 N.Y.2d 354 (1976), arbitrators are powerless to award punitives even if agreed upon by the parties), *with Raytheon Company v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989) (upholding punitive damages award, in application of strong federal policy favoring arbitration, under circumstances "where such conduct could give rise to punitive damages if proved to a court" *id.* at 12). An Award of liquidated damages, however, is subject to all requirements of an Award made pursuant to Article Seventeen.

The Adjudicator also retains the discretion to hold a bifurcated proceeding -- *i.e.* a separate proceeding following the Adjudicator's determination of liability -- for the purpose of determining the award of damages.

These remedies are not automatic, and the discretion to award any of them remains with the Adjudicator.

TWENTY: Sanctions

Any award of sanctions will be enforceable as an arbitrator's Award under federal or state law. Without this power to sanction, the Model Procedure could be used by either Party as

a means to abuse the process rather than seek resolution of the Dispute.

TWENTY-ONE: Arbitration Statute

Article Twenty-One confirms that an adjudication proceeding pursuant to the Model Procedure is an arbitration proceeding and subject to and governed by the Federal Arbitration Act, unless its jurisdictional requirement of interstate commerce is not met. In that event, state arbitration law applies.

TWENTY-TWO: Voluntary Use of Model Procedure

Article Twenty-Two provides that the Parties may agree, after a Dispute has arisen, to proceed under the Model Procedure on matters that by law may not be subject to final and binding arbitration (for example, if certain case law is read broadly, allegations of race or sex discrimination). These pre-dispute procedures are transformed, in effect, to post-dispute procedures as the Parties acknowledge prior to proceeding that the law might not otherwise permit final and binding arbitration of the claim.

Disagreement over the arbitrability of a claim (for example, of race or sex discrimination), however, does not excuse

a Party from application of the Model Procedure in the first instance, as explained in Articles Two and Twenty-Three.

TWENTY-THREE: Court and Administrative Proceedings

Article Twenty-Three provides that a Party will not proceed with and will discontinue or stay, to the extent permitted by law, any litigation or administrative proceeding on a claim that is subject to the Model Procedure. In this way, duplication of expense and remedies is eliminated.

This requirement will not prevent a Party from exercising his or her statutory right, if expressly preserved by law, to file a claim with an administrative agency.

For those claims that are not subject to final and binding resolution under the Model Procedure, or where the right to pursue a statutory claim is expressly preserved by law, a Party may still pursue its other action though this may require that Party to petition the court or agency for a stay of that proceeding so that the Adjudication may proceed first. As a practical matter, in most instances, this should not result in any material delay or injustice, since a proceeding under the Model Procedure will usually precede

a trial or hearing in a litigation or administrative action raising the same issues.

TWENTY-FOUR: Cancellation of Model Procedure and Reversion to At-Will Employment

Article Twenty-Four provides that, upon cancellation of the Model Procedure or upon a finding that the Model Procedure is unenforceable, the relationship between the Parties shall revert back to what it would have been under the applicable state law (and what it would have been in the absence of the Model Agreement), which in a vast majority of states will be employment-at-will or some variation thereof.

TWENTY-FIVE: Revision of Model Procedure

Article Twenty-Five seeks to inject some flexibility in the Model Procedure so that it may be adapted to the special needs of the Parties. The Model Procedure should not be amended or revised in such a way, however, so as to undermine its fundamental fairness.